AMANAH BUTLER (M) SDN BHD

v.

YIKE CHEE WAH

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-04-10 OF 1994]
17 FEBRUARY 1997

CIVIL PROCEDURE: *Appeal - Pleadings - Appeal from Industrial Court to High Court to Court of Appeal - Whether appellant bound by pleadings before Industrial Court - Whether appellant can rely on unpleaded case at appellate stage*

ADMINISTRATIVE LAW: *Rules of natural justice - Breach of - 'Wednesbury unreasonableness' - Failure of Industrial Court to consider matters it was bound to consider - Whether award bad - Whether unfair labour practice*

ADMINISTRATIVE LAW: *Judicial review - Merits, consideration of - Whether High Court or Court of Appeal has jurisdiction to consider merits of case - Whether open to appellate Court to conclude that employee was dismissed without just cause or excuse - Whether useful to remit case to Industrial Court for re-adjudication - R. Rama Chandran v. Industrial Court of Malaysia & Anor*

ADMINISTRATIVE LAW: *Remedies - Damages - Whether appellate Court has power and jurisdiction to grant - Assessment of quantum - Whether appellate Court had benefit of argument*

The appellant is a company dealing in foreign exchange and the respondent was a manager of the appellant. As per his contract of employment, the respondent received a fixed salary and a percentage of the appellant's annual profits. Subsequently, Bank Negara ('BN') issued a directive ('the BN directive') that, with effect from the financial year 1991, money broking firms would no longer be allowed to share their profits with their employees. The appellant replied to BN stating, *inter alia*, that its existing 'profit-sharing scheme' was a contractual obligation under its employees' contract of employment. BN then advised the appellant to re-negotiate a new remuneration scheme with its employees.

In August 1991, the appellant unilaterally altered the terms and conditions of the respondent's contract of employment by giving him a 'bonus' of a sum far less than that he had previously received by way of profit-sharing. The

sole reason advanced by the appellant was that the respondent had performed dismally. As a result of this reduction in income, the respondent considered himself to have been dismissed without just cause or excuse, ceased work, and proceeded to make representations to the Director General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967. The matter then went before the Industrial Court ('the IC') and the IC dismissed the respondent's claim and upheld the appellant's contentions that: (i) payment under the appellant's 'performance commission/bonus policy' as embodied in the appellant's personnel manual was at the appellant's sole discretion; (ii) the payment of performance commission/bonus was not the appellant's contractual obligation under its employees' contract of employment; (iii) the respondent was not contractually entitled to the performance commission/bonus scheme the variation of which by the appellant could not have amounted to a fundamental breach of the respondent's contract of employment; and (iv) the respondent was not constructively dismissed.

Dissatisfied, the respondent applied to the High Court for an order for *certiorari* to quash the IC's award. The High Court acceded to the application and remitted the matter to the IC for re-adjudication. The appellant appealed. Before the instant Court, the appellant contended *de novo* that the reason for the smaller sum given to the respondent by way of bonus was because of the BN directive.

Held:

Per Gopal Sri Ram JCA

[1] The fate of the appellant's instant appeal must, *ex necessitae rei*, depend on its pleadings before the IC; the appellant must stand or fall by the reason it advanced in its pleaded case before the IC.

[1a] It was evident from the appellant's statement in reply that it did not rely on the BN directive to justify the action it took against the respondent. Consequently, it was not now open to the appellant, at the appellate stage, to rely upon an unpleaded case as justification for the action it took against the respondent. The point was simply not available to the appellant.

[2] In coming to its conclusion that the respondent was not contractually entitled to any profit-sharing scheme, the IC had relied solely on the appellant's personnel manual, and had failed to consider the correspondence between the appellant and BN in which the appellant had clearly admitted that the profit-sharing scheme was its contractual obligation under the respondent's contract of employment. The IC had

failed to consider matters which it was bound to consider. Consequently, the award of the IC was bad for 'Wednesbury unreasonableness'. No reasonable tribunal similarly circumstanced would have come to a like decision based upon the material made available to the IC.

[2a] Upon a consideration of the **merits** of the instant appeal, it was clear that the appellant did not reduce the respondent's total income in reliance on the BN directive; nor did it do so because the payment of performance commission/bonus was within its discretion. The appellant reduced the respondent's earnings because the latter had performed unsatisfactorily. Had the IC addressed itself to this issue (and to the correspondence between the appellant and BN), it would have certainly found that the respondent had been a victim of unfair labour practice.

[2b] Following the decision of the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor*, it was open to the High Court and to the instant Court to conclude that the respondent had been dismissed without just cause or excuse.

[2c] In view of the instant court's finding that the respondent had been dismissed without just cause or excuse, no useful would be served by getting the IC to deal with the matter afresh; it would only occasion further delay.

[2d] The proper remedy for the respondent would be compensation in lieu of re-instatement which the instant Court had the power and the jurisdiction to grant. However, as the instant Court did not have the benefit of any argument on quantum, it was best that the assessment be left to the IC.

Obiter dictum:

[1] No useful purpose would be served by saying whether the respondent was 'constructively dismissed'. The phrase 'constructive dismissal' is a mere label. It does nothing to clarify matters. On the other hand, it causes confusion. It is better that the phrase be not resorted to at all.

[Appellant's appeal dismissed; High Court's order for certiorari affirmed; and order of High Court remitting case to Industrial Court set aside and substituted with order directing Industrial Court to assess quantum.]

*[**Bahasa Malaysia** translation of headnotes]*

PROSEDUR SIVIL: *Rayuan - Pliding - Rayuan daripada Mahkamah Perindustrian kepada Mahkamah Tinggi kepada Mahkamah Rayuan - Samada perayu terikat oleh pliding-pliding di hadapan Mahkamah Perindustrian - Samada perayu boleh bergantung pada kes yang tidak diplidkan di peringkat rayuan*

UNDANG-UNDANG PENTADBIRAN: *Kaedah-kaedah keadilan asasi Kemungkiran akan - "Wednesbury unreasonableness" - Kegagalan Mahkamah Perindustrian untuk menimbang perkara yang ia mesti pertimbangkan - Samada award tidak wajar - Samada merupakan suatu amalan buruh secara tidak adil*

UNDANG-UNDANG PENTADBIRAN: *Kajian kehakiman - Pertimbangan merit - Samada Mahkamah Tinggi atau Mahkamah Rayuan mempunyai bidangkuasa untuk menimbangkan merit kes - Samada terbuka kepada Mahkamah rayuan untuk memutuskan bahawa pekerja telah dipecat tanpa alasan atau sebab yang adil - Samada berguna untuk mengembalikan kes kepada Mahkamah Perindustrian untuk diadjudikasi semula - R. Rama Chandran lwn. Industrial Court of Malaysia & Anor.*

UNDANG-UNDANG PENTADBIRAN: *Remedi - Gantirugi - Samada Mahkamah rayuan mempunyai kuasa dan bidangkuasa untuk memberikannya - Taksiran kuantum - Samada Mahkamah rayuan mendapat manafaat dari hujahan*

Perayu adalah sebuah syarikat yang berurusan dalam matawang asing dan responden adalah pengurus perayu. Menurut kontrak pekerjaannya, responden menerima pendapatan yang tetap dan satu jumlah peratus daripada keuntungan tahunan perayu. Berikutan itu, Bank Negara ("BN") telah mengeluarkan satu arahan ("arahan BN") bahawa, berkuatkuasa daripada tahun kewangan 1991, firma-firma pembrokeran wang tidak lagi dibenarkan berkongsi keuntungan mereka dengan kakitangan-kakitangan mereka. Perayu telah menjawab BN dengan menyatakan, antara lainnya, bahawa "profit-sharing scheme" nya yang sedia ada adalah satu kewajipan kontraktual di bawah kontrak pekerjaan kakitangan-kakitangannya. BN kemudiannya telah menasihatkan perayu supaya merundingkan semula satu sekim saraan baru dengan kakitangannya.

Dalam bulan Ogos 1991, perayu telah secara bersendirian mengubah terma-terma dan syarat-syarat kontrak pekerjaan responden dengan memberikan responden satu "bonus" yang jumlahnya jauh berkurangan daripada yang diterima beliau dahulunya melalui perkongsian keuntungan. Satu-satunya alasan yang diberikan oleh perayu adalah bahawa prestasi responden telah merosot. Akibat pengurangan dalam pendapatan ini, responden menganggapkan dirinya sebagai telah dipecat tanpa alasan atau sebab yang adil, tidak lagi bekerja, dan

seterusnya membuat representasi kepada Ketua Pengarah Perhubungan Perindustrian di bawah s. 20(1) Akta Perhubungan Perindustrian 1967. Halperkara tersebut kemudiannya di dengar di hadapan Mahkamah Perindustrian ("MP") dan MP telah menolak tuntutan responden dan mempertahankan penegasan perayu bahawa: (i) pembayaran di bawah "performance commission/ bonus policy" perayu sepertimana yang diwujudkan dalam manual kakitangan perayu adalah perkara di bawah budibicara perayu semata-mata; (ii) pembayaran komisyen prestasi/bonus bukannya merupakan kewajipan kontraktual perayu di bawah kontrak pekerjaan kakitangan-kakitangannya; (iii) responden adalah tidak berhak di sisi kontrak kepada skim komisyen prestasi/bonus tersebut, dan pengubahannya oleh perayu tidak membawa kepada satu kemungkiran yang fundamental terhadap kontrak pekerjaan responden; dan (iv) responden tidak dipecat secara konstruktif.

Berasa tidak puashati, responden telah memohon kepada Mahkamah Tinggi untuk mendapatkan satu perintah bagi *certiorari* untuk membatalkan award MP tersebut. Mahkamah Tinggi telah menyetujui permohonan itu dan telah mengemukakan perkara tersebut kepada MP untuk diadjudikasikan semula. Perayu telah merayu. Di hadapan Mahkamah semasa ini, perayu telah secara *de novo* menegaskan bahawa alasan bagi jumlah yang lebih kecil yang diberikan kepada responden dengan cara pembayaran bonus adalah disebabkan oleh arahan BN.

Diputuskan:

Oleh Gopal Sri Ram HMR

[1] Nasib rayuan semasa perayu mestilah, *ex necessitae rei*, bergantung pada plidingnya yang berada di hadapan MP; perayu mestilah kalah atau menang menurut alasan yang diberikan dalam kesnya yang diplidkan di hadapan MP tersebut.

[1a] Adalah jelas daripada pernyataan jawapan perayu bahawa ianya tidak bergantung pada arahan BN bagi mewajarkan tindakan yang telah diambil olehnya terhadap responden. Akibatnya, ianya kini tidak terbuka kepada perayu, diperingkat rayuan, untuk bergantung ke atas suatu kes yang tidak diplidkan sebagai mewajarkan tindakan yang telah diambilnya terhadap responden. Hujah sebegini sememangnya tidak boleh dikemukakan oleh perayu.

[2] Dalam mencapai keputusannya bahawa responden tidak secara kontraktual berhak kepada apa-apa sekim perkongsian keuntungan, MP telah bergantung semata-mata atas manual kakitangan perayu, dan telah gagal mempertimbangan perutusan surat antara perayu dan BN dalam mana perayu telah dengan jelasnya mengakui bahawa sekim perkongsian keuntungan tersebut adalah merupakan kewajipan kontraktualnya di bawah kontrak pekerjaan responden. MP telah gagal

menimbangkan perkara-perkara yang ianya terikat untuk pertimbangkan. Akibatnya award MP adalah tidak wajar atas "Wednesbury unreasonableness". Tidak akan terdapat tribunal yang wajar, dalam keadaan yang sama, akan mencapai keputusan yang sedemikian berdasarkan dokumen-dokumen yang diadakan bagi pertimbangan MP.

[2a] Setelah menimbangkan merit-merit rayuan semasa ini, ianya jelas bahawa perayu tidak mengurangkan jumlah pendapatan responden berdasarkan arahan BN; dan tidak juga melakukan sedemikian kerana pembayaran komisyen prestasi/bonus itu adalah perkara budibicaranya. Perayu telah mengurangkan pendapatan responden kerana responden telah memberikan prestasi yang tidak memuaskan. Sekiranya MP telah mengambil perhatian akan isu ini (dan kepada perutusan surat antara perayu dan BN), ianya tentu sekali akan mendapati bahawa responden telah menjadi mangsa kepada amalan buruh yang tidak adil.

[2b] Berikutan dengan keputusan Mahkamah Persekutuan dalam *R Rama Chandran v. Industrial Court of Malaysia & Anor.*, ianya adalah terbuka kepada Mahkamah Tinggi dan Mahkamah semasa untuk memutuskan bahawa responden telah dipecat tanpa alasan atau sebab yang adil.

[2c] Memandangkan keputusan Mahkamah semasa bahawa responden telah dipecat tanpa alasan atau sebab yang adil, ianya adalah tidak berguna bagi MP menguruskan perkara tersebut semula; ianya akan hanya menyebabkan kelewatan yang berlanjutan.

[2d] Remedi yang wajar bagi responden adalah pampasan sebagai ganti bagi pengambilan semula yang mana Mahkamah semasa berkuasa dan mempunyai bidangkuasa untuk berikan. Walaubagaimanapun, oleh kerana Mahkamah semasa tidak mempunyai apa-apa penghujahan mengenai kuantum, adalah terbaik taksiran dilakukan oleh MP.

Obiter dictum:

[1] Tidak terdapat tujuan yang berguna dengan menyatakan samada responden telah di"constructively dismissed". Ungkapan "constructive dismissal" adalah semata-mata satu label sahaja. Ianya tidak menjelaskan halperkara-halperkara yang berbangkit. Ia sebaliknya menyebabkan kekeliruan. Adalah lebih baik ungkapan tersebut tidak digunakan sama sekali.

[Rayuan perayu ditolak; perintah Mahkamah Tinggi untuk certiorari disahkan; dan perintah Mahkamah Tinggi mengemukakan kes kepada Mahkamah Perindustrian diketepikan dan digantikan dengan perintah mengarahkan Mahkamah Perindustrian untuk menaksirkan kuantum.]

Cases referred to:
Goon Kwee Phoy v. J & P Coats (M) Bhd. [1981] 2 MLJ 129 ***(foll)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(foll)***
Harris Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors. [1996] 4 CLJ 747 ***(cit)***
Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd. [1996] 3 CLJ 837 ***(cit)***
Ang Beng Teik v. Pan Global Textile Bhd. [1996] 4 CLJ 313 ***(cit)***
Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd Noh, Supreme Court Civil Appeal No. 02-57-93 ***(cit)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R1-25-9-94]

For the appellant - N. Sivabalah; M/s. Shearn, Delamore & Co.
For the respondent - B. Lobo; M/s. Lobo & Associates

JUDGMENT

Gopal Sri Ram JCA:

The appellant is a company that deals in foreign exchange; Forex for short. It acts for customers who speculate on the value of all sorts of currencies. It buys and sells currencies in the money market with a view to profit. It is just like a stockbroker, except that it deals in currencies instead of shares. It has several departments. Each department or desk as it is known in the trade, deals with a range of currencies. A licence is required to carry on the business. And Bank Negara exercises strict control over such activities.

The respondent was, at all material times, employed as a manager of the appellant. His designation was "manager (forex)". He was in charge of the continental currencies and Ringgit desk. Under the terms of his contract of employment, the respondent received a fixed salary as well as a percentage of the profits annually earned by the appellant.

On 21 February 1991, Bank Negara wrote to the appellant stating that with effect from the financial year 1991, money broking companies were not allowed to share their profits with their employees. There then followed an exchange of correspondence between the appellant and Bank Negara of which two letters from the latter to the former require mention.

The first is a letter dated 25 March 1991 which contains the following paragraphs:

> We refer to your letter of 26 February 1991 on the above matter and write to inform you that as indicated in our earlier letter of 21 February 1991, all money broking firms, without exception, are required to discontinue profit-sharing schemes for their employees.
>
> We take note that Amanah Butler's existing profit-sharing scheme is a contractual obligation under its terms and conditions of employment. We would advise that immediate steps should be taken by your company to re-negotiate and implement a new remuneration scheme, in order to conform with the above requirement.

The second is a letter dated 15 June 1991 which reads as follows:

> We refer to your letter dated 24 April 1991 on the above matter. Bank Negara Malaysia has no objection to Amanah Butler Malaysia Sdn. Bhd. paying bonuses to its employees, provided that the payment of bonus is not on the basis of a contractual obligation calculated as a predetermined percentage of its annual profit before tax.

The appellant did not attempt to re-negotiate the terms of the contract of employment which the respondent had with it as advised by Bank Negara. Instead, in August 1991, it unilaterally altered the terms and conditions of the respondent's contract by paying him a bonus of a sum less than that he had previously earned by way of commission. The justification advanced for this reduction in income was that the desk of which the appellant was in charge had performed dismally. The appellant also expressed its disappointment at the respondent's performance. In essence, the appellant reduced the respondent's income not because of the directive from Bank Negara, but for misconduct namely, the poor quality of the respondent's work.

The respondent was unhappy with the loss in income and the reason given for it by the appellant. He considered himself to have been dismissed and therefore ceased work. He then made representations to the director general under s. 20(1) of the Industrial Relations Act 1967 ("the Act"). The director general having unsuccessfully attempted a reconciliation of the dispute made his report to the Minister, who then referred the dispute to the Industrial Court. The parties then delivered their pleadings.

The relevant paragraphs of the respondent's statement of case read as follows:

> 3.1 In or about August 1991, the company purported to unilaterally vary the terms of the claimant's contract of employment pertaining to the profit sharing scheme. The claimant then by letter dated 6 August 1991 wrote to the company on the matter. A copy of the said letter is annexed hereto and marked 'CL1'.
>
> 3.2 By letter dated 9 August 1991 the company replied to Exh. CL1. A copy of the said letter is annexed hereto and marked 'CL2'.

3.3 By letter dated 15 August 1991 the claimant wrote to the company *inter alia* that he considered himself dismissed with immediate effect. A copy of the said letter which is self-explanatory is annexed hereto and marked 'CL3'.

4. The claimant contends and will contend at the hearing that the said dismissal is without any or any just cause or excuse.

5. Further or in the alternative the claimant will contend that the said dismissal is contrary to the principles of natural justice and unfair labour practice which should be struck down as such by the Court.

In its statement in reply, the respondent put its case as follows:

4. With regards to para. 3 of the statement of case, the company avers the following:

4.1 The claimant commenced employment with the company on 1 October 1976.

4.2 Under the company's performance commission/bonus policy, the company would set aside 30% of its profit before tax to be distributed among all staff.

4.3 Notwithstanding the company's obligation as stated in para. 4.2 above, the eligibility and the payment of the performance commission/bonus was not a contractual obligation of the company with each individual staff.

4.4. The quantum of bonus payable to each employee was based on performance and at the sole discretion of the company.

4.5. For the period of January to June 1991, based on his performance, the claimant was given a bonus of RM7,200.

5. By a letter dated 6 August 1991, annexed to the statement of case as exh. 'CL1', the claimant contended that the company in paying him the bonus had unilaterally varied his contractual rights thus deeming it a breach of his contract.

6. By a letter dated 9 August 1991, annexed to the statement of case as exh. 'CL2', the company in reply to 'CL1' denied that it was in breach of its obligation.

7. By a letter dated 15 August of 1991, the claimant contended that he considered himself dismissed by the company with immediate effect. A copy of the said letter has been annexed to the statement of case and marked Exh. 'CL3.'

8. Paragraphs 4 and 5 of the statement of case are strictly denied and the claimant is put to strict proof thereof.

8.1 The company categorically denies that the claimant was dismissed from service without just cause and excuse.

8.2 On the contrary, the company avers and will so submit that the claimant abandoned his services with the company without any lawful excuse.

8.3 The company will adduce all relevant evidence at the hearing of this action.

9. Wherefore the company prays that the claimant's claims be dismissed.

After hearing evidence and argument, the Industrial Court dismissed the respondent's complaint. Its reasons are reflected in the following passages extracted from the learned Chairman's award:

> The claimant agreed it was the absolute discretion of the company to pay bonus ... The company's case is that the claimant was not contractually entitled to a profit sharing scheme and the variation of this scheme by the company was not a breach of his contract entitling him to plead constructive dismissal. The profit sharing scheme for employees is in writing in the company's personnel manual, Exh: CO1, and kept by the finance and administration manager.
>
> The company's only witness the general manager, COW1 produced the original personnel manual which was approved by the board of directors of the company. It contained the terms and conditions of employment. He testified that under the personnel manual the payment under the profit sharing scheme was not contractual. It was based on merits of performance of individual employees. There had been cases of employees receiving zero bonus prior to 1991. Under Exh: CO1 the only obligation of the company was to set aside 30% of pre-tax profit for the employees. Apart from labelling of bonus instead of profit sharing there was no change in the mode of payment. The general manager further testified that bonus was given on individual performance and it depended on productivity of each section. The amount each individual received varied from section to section, individual to individual and year to year.
>
> The personnel manual has expressly stated bonus is never contractual. Clause 7 is produced below:
>
> > The eligibility and the payment of performance commission/bonus is not a contractual obligation on the part of the company with each individual staff. The company has the full discretion to withold any part of the whole sum eligible to any staff without having to state any reason for such action.
>
> The payment of bonus should never be a permanent feature. If it is so it is not bonus anymore. Bonus is meant as an incentive for workers and staff in the company. It is uncertain of payment and being paid only when a company makes a profit. Even if it is paid, the amount is unspecified. It is conditional upon the profits made and the performance of each individual staff at the end of the year.

In the instant case, apart from the express wordings of the above Cl. 7 of CO1 all the features of a non-contractual payment of bonus are abundantly clear from the mode of bonus payment.

For the above reasons it is the finding of this Court that the claimant was not contractually entitled to any profit sharing scheme and his contention that he was constructively dismissed must fail on this ground.

The company has not committed a breach of contract which goes to the root of the contract.

Since this Court has held that there is no breach of the claimant's contract of employment to entitle him to claim constructive dismissal there is no necessity to consider whether his subsequent behaviour could be regarded as having elected to affirm the contract and lose the right to repudiate the contract.

I therefore hold that there is no constructive dismissal as claimed by the claimant and dismiss his claim.

The respondent, being dissatisfied with the award of the Industrial Court, applied to have it quashed in *certiorari* proceedings. The High Court acceded to the application. It issued *certiorari*, quashed the award and remitted the matter to the Industrial Court for re-adjudication. The reasons for the learned Judge's decision appear sufficiently from the following paragraphs in his judgment:

The learned Chairman of the Industrial Court came to the conclusion that the claimant was not contractually entitled to any profit sharing scheme by relying solely on cl. 7 of the personnel manual (Exh. CO1). He did not consider at all the contents of the letters written by the company to Bank Negara. The company had in very clear language stated that the profit sharing was contractual and that the company would be committing a breach of the employment contract if a change was made without the consent of the employees. The scheme under the personnel manual is not that of profit sharing. It is performance commission/ bonus. The company did not produce the claimant's contract of employment to show some light on this matter.

I find that the learned Chairman had failed to take into consideration matters which he was bound to consider. The letters written by the company to the Bank Negara are very relevant documents and should have been considered as they contradict the company's contention that there was no contractual profit-sharing scheme and that the scheme for payment of bonus as in the personnel manual was not changed by the directive from the Bank Negara. He had acted unreasonably. He also did not give any reason why he refused to consider the said documents. I find that the Industrial Court had committed an error going into jurisdiction. I therefore allowed the application in terms of the motion with costs.

Against this decision of the High Court, the appellant has appealed.

The appellant argued that the learned Judge had gone wrong in issuing *certiorari*. It was contended that the learned judge overlooked the directive from Bank Negara. The appellant had, prior to that directive, shared its pre-tax profits with, among others, the respondent. This was done pursuant to the terms of the relevant contract of employment. After receiving the directive from Bank Negara, the appellant could no longer share its profits with its employees. The appellant had not therefore forced the respondent out of his employment and thereby deprived him of his livelihood. Thus ran the appellant's argument.

For the respondent it was submitted that the appellant must stand or fall by the justification advanced by it in its pleaded case before the Industrial Court. It was nowhere averred by the appellant in its statement in reply that a lower payment by way of bonus was made because of the directive from Bank Negara. Indeed, Bank Negara had advised the appellant to re-negotiate the terms of the contract of employment that the appellant had with its employees. This was not done. The justification advanced by the appellant for its conduct was that there was no right vested in the appellant to receive a bonus, which was a benefit that was within the discretion of the appellant as employer. The real reason for paying the respondent a much smaller sum under a different scheme was to punish him for alleged misconduct and thereby to force him out of his work. Lastly, the Industrial Court had proceeded upon an erroneous basis in that, in its award, it had attributed to the respondent a concession which he had never made during his evidence.

So much for the submissions advanced on the respondent's behalf.

At the conclusion of arguments on the appeal, we reserved judgment. However, before doing so, we requested Counsel to put in written argument to supplement their oral submissions. Both Counsel have assisted us by delivering written submissions.

Having given this matter our most careful consideration, we have come to the conclusion that this appeal must be dismissed. The reasons for our decision are as follows.

First, we agree with Lobo of Counsel for the respondent that the fate of the appellant's case must *ex necissitae rei*, depend upon its pleadings before the Industrial Court. Indeed, the proposition relied upon by him is concluded by high authority.

In *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 where Raja Azlan Shah CJ (Malaya) (as he then was) said (at p. 136):

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to*

> *give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

Again, in *Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147, Mohd. Eusoff Chin, CJ (Malaysia), who formed the majority, said:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil Court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. *The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.* (Emphasis added.)

We too have had occasion to apply this principle quite recently. See, *Harris Solid State (M) Sdn. Bhd. Ors. v. Bruno Gentil Pereira & Ors.* [1996] 4 CLJ 747.

As may be seen from its statement in reply, the appellant did not rely upon the Bank Negara directive to justify the action it took against the respondent. Consequently, in our view, it is not now open to the appellant, at the appellate stage to rely upon an unpleaded case as justification for the action it took against the respondent. The point is, contrary to the first impression we gained of the case, simply not available to the appellant.

Secondly, as found by the learned Judge, the Industrial Court had held that the payment of bonus was within the discretion of the appellant as employer without having any regard to the appellant's own admission made in its letters to Bank Negara. Neither did that Court give any reasons for excluding these letters from consideration. In the words of the learned Judge, the Industrial Court had acted unreasonably. To put it in a phrase, the award was bad for "Wednesbury unreasonableness". No reasonable tribunal similarly circumstanced would have come to a like decision based upon the material made available to the Industrial Court in the present case. This ground of attack involves an examination of the merits of the case. See, *Rama Chandran v. The Industrial Court of Malaysia* (*supra*), per Edgar Joseph Jr. FCJ; *Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd.* [1996] 3 CLJ 837.

Upon a consideration of the merits, it is clear that the appellant did not reduce the respondent's total income in reliance of the Bank Negara directive. It did not do so because the payment of bonus was within its discretion. It did not re-negotiate the contractual provision as advised by Bank Negara. It reduced the respondent's earnings because he had performed unsatisfactorily. Had the Industrial Court addressed itself to this issue, to the appellant's letters to Bank Negara as well as the other relevant evidence, it would have certainly found that the respondent had been a victim of unfair labour practice. In the words, of his Counsel, the appellant had, by its conduct towards the respondent "squeezed him out of employment".

Thirdly, it is clear that the Industrial Court had relied, *inter alia*, upon an admission allegedly made by the respondent, on the issue of bonus, during his testimony before that Court. In an affidavit filed in support of his application for *certiorari*, the appellant denied having made the concession. The appellant did not, in the reply affidavit filed on its behalf, rebut this allegation. The allegation is therefore deemed to be accepted by the appellant. See, *Rama Chandran (supra)*. Although much may not turn upon this point when taken in isolation, it is a factor to be taken into account when ascertaining whether the Industrial Court had acted unreasonably when making its determination.

By reason of the findings made by the learned Judge, it was open for him to conclude that the respondent had been dismissed without just cause or excuse. He did not do so only because he did not have the benefit of the jurisprudence that has flowed since his decision. Such a conclusion is a natural sequence of logic and deduction that flows from his primary findings.

Since we are seised of the matter, it is open to us, acting upon the decision in *Rama Chandran (supra)*, to arrive at such a conclusion. And we do. Indeed, upon the material made available to the Industrial Court a finding that the respondent had been dismissed cause or excuse is inevitable.

No useful purpose will be served by saying whether the respondent was "constructively dismissed". The phrase constructive dismissal is a mere label. It does nothing to clarify matters. On the other hand, it causes confusion. It is better that the phrase be not resorted to at all: *Ang Beng Teik v. Pan Global Textile Bhd.* [1996] 4 CLJ 313. Unfortunately the Industrial Court paid too much attention to it. That is why it went wrong - in the jurisdictional sense.

We next have to deal with the consequential order made by the learned Judge. As earlier observed, he remitted the whole case to the Industrial Court for re-hearing. In view of our finding that the respondent had been dismissed without just cause or excuse, no useful purpose will be served by getting the Industrial Court to deal with the matter afresh. It will only occasion further delay. All that remains to be dealt with is the relief that ought to be given to the respondent.

In his statement of case, the respondent has asked for reinstatement. This is the usual remedy that is to be awarded in Industrial law. But there may be circumstances where the reinstatement is inappropriate. This is such a case.

The respondent was in a managerial position. The circumstances in which he left the appellant show that mutual trust is lacking. After he was dismissed, be joined a stockbroking firm. No useful purpose will served from uprooting him from his present place of work and thrusting him upon the appellant. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation in lieu of reinstatement.

We have the power and the jurisdiction to grant that relief here and now despite the fact that we intend to dismiss the appeal. See, *Harris's Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors. (supra)*. The view which this Court took in that case has since been approved by the Federal Court. See *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd Noh, Supreme Court Civil Appeal No. 02-57-93*, yet unreported.

In the present appeal we have not had the benefit of any argument upon the quantum. It is therefore best that the matter be left to the Industrial Court to make the assessment.

In the result, the appeal is dismissed. The order of *certiorari* made by the learned Judge is affirmed. So is the order he made as to costs. The order remitting the case to the Industrial Court is set aside. In its place, we substitute an order directing the Industrial Court to assess the quantum of compensation that is to be paid by the appellant to the respondent. The respondent will have the costs of this appeal. The deposit paid into Court by the appellant shall be paid out to the respondent to account of his taxed costs.

Reported by Gan Peng Chiang